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L. R. A. 1916A, 940, Ann. Cas. 1917A, 179, is not controlling. The Supreme Court of Tennessee held in that case that tobacco was not food and that we are ready to admit, and it may be that the decision of that case was correct, but we are inclined to the opinion that the Court of Appeals of Tennessee had the best of the argument in that case.

"We have read with care the very able and instructive brief for the appellee, in which he argues and we think proves that tobacco is not food for human beings at least, no matter how much tobacco worms or the town goat may relish it, but we are of opinion that we are not restricted to this narrow question, nor have we reached the limit when we admit that tobacco is not a beverage, or a condiment, or a drug. The fact that the courts have at this time made only the exceptions mentioned to the general rule does not prevent a step forward for the health and life of the public. The principles announced in the cases which recognize the exceptions, in our opinion, apply, with equal force, to this case. * * *

"We will reverse the judgment of the lower court as to the manufacturer and affirm the judgment for the distributor. The distributor could not have suspected that human toes were concealed in the plug, and was not negligent in not discovering the noxious contents of the plug."

Stare Decisis—Application to Police Power—Validity of Indiana Prohibition Act.—In *Schmitt v. Cook Brewing Co.*, 120 N. E. 19, the Supreme Court of Indiana in holding the Indiana Prohibition Law (Acts 1917, c. 4), prohibiting the manufacture and sale of intoxicants, valid, as coming within the police power of the state, laid down the rule that the principle of stare decisis has no application to the police power of the state, because there can be no property rights which are not subject to such power; the rule of stare decisis being a rule of property the use of which does not affect the public welfare.

The court said:

"It is also insisted on behalf of appellee herein that it has been decided by this court that there is no power to prohibit the manufacture of intoxicating liquor under our Constitution, and that the case of *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391, and a few cases following, settle that question. It cannot be determined by those cases on what principle the court was acting. The question stood undecided for three years, and then the law was pronounced void without assigning any reasons as to whether it was considered void under the state Constitution or federal Constitution. That law in

some of its particulars would have been void at that time under the federal Constitution, but since then there have been passed by the federal Congress the Wilson Act and the Webb-Kenyon Act (U. S. Comp. St. 1916, §§ 8738, 8739), both of which have been upheld by the Supreme Court of the United States. In *re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Clark Dist. Co. v. Western M. R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845. That law also provided for official agencies to dispense liquor, thus creating a monopoly on the part of the state in the traffic, and it may have been considered void for that reason. But since that time public monopolies have been justified in the control of intoxicating liquor upon the ground that the nature of the traffic warrants its entire prohibition. See 15 Ruling Case Law, pp. 267, 268, and authorities there cited.

"The principle of *stare decisis*, if it existed, has no application to the police power because there can be no property rights which are not subject to this power. In *Pittsburgh, etc., R. Co. v. Chappell*, 183 Ind. 141, at 146, 106 N. E. 403, 405, Ann. Cas. 1918A, 627, this court said:

"A long and firmly settled principle of law which has grown out of a well-ordered civil society is that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall neither encroach injuriously on equal enjoyment of their property by others who have an equal right to the enjoyment of their property, nor be injurious to the community. The law is also so fixedly settled as to be beyond controversy that rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the general safety of persons and property, in the same sense as are all contracts and all property whether owned by private persons or by corporations. Laws carrying these principles into effect in particular instances are but a proper exercise of the police power by the Legislature and are not to be hindered or overthrown by the constitutional limitations named as is claimed by counsel. Indeed, the Legislature cannot contract away its police power—the power to legislate for the protection of the lives, health, and property of the citizens of the state.'

"And in the case of *King v. Inland Steel Co.*, 177 Ind. 201, 212, 96 N. E. 337, 97 N. E. 529, this court said:

"The rule of *stare decisis*, which counsel invoked to induce us to adhere to those decisions, cannot chain us to error. That may be so when decisions have become a rule of property, but not in decisions involving a subject-matter such as here affected.'

"If this were not so, mistaken decisions would destroy that very power of society to protect itself and a new Constitution would be created by the courts. Courts cannot decide away that which the state cannot contract away. Courts cannot make a new fundamental law by erroneously reading limitations into the Constitution not therein expressed. The principle of stare decisis is a rule of property the use of which does not affect the public welfare. It cannot be invoked to shut off police power. *State ex rel. v. City Council of Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345."